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January 29, 2019  
Commission on  
State Mandates

EDMUND G. BROWN JR. ■ GOVERNOR  
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

LATE FILING

January 28, 2019

Ms. Heather Halsey  
Executive Director  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814

**Response to Test Claim 17-TC-24, Water Code Section 13383(a) Phase I MS4 Trash Order Issued to County of Orange, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017**

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed Test Claim 17-TC-24, submitted by the County of Orange (Claimant). The Test Claim alleges state-mandated, reimbursable costs associated with an executive order (Trash Order) issued to Claimant by the California Regional Water Quality Control Board, Santa Ana Region (Regional Board) on June 2, 2017.

The genesis of the Trash Order is Resolution No. 2015-0019 (Trash Amendments), issued by the State Water Resources Control Board on April 7, 2015. The Trash Order requires Claimant to select a track to follow to comply with the Trash Amendments to limit the discharge of trash into state waters via Claimant's Municipal Separate Storm Sewer Systems (MS4s).

Claimant's MS4 is part of their municipal sewer system. The municipal sewer system is funded at least in part by fees imposed on the system's users. Claimant alleges they do not have the authority to increase these fees to recoup the costs associated with the Trash Order because of limitations imposed by Article XIII D of the California Constitution (Proposition 218). Article XIII D states that "(e)xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge..."

Claimant asserts it "...lacks sufficient 'authority' to pay for the mandates in the Trash Order within the meaning of Government Code section 17556 because any charge, fee, or assessment is contingent on the outcome of an election by voters or property owners and because a development fee is not available to fund the state mandates in the Trash Order."

Finance believes Claimant does have stormwater fee authority undiminished by Proposition 218. Senate Bill 231 (2017), effective January 1, 2018, defines "sewer" for purposes of Proposition 218 and its exception to voter approval for sewer, water and refuse collection fees. The definition specifically includes stormwater and confirms stormwater fees are not subject to the voter approval requirement, but rather the majority protest procedure, in Proposition 218.

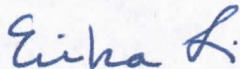
In *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal. App.4<sup>th</sup> 794, college districts challenged the State Controller's mandate claiming instructions that automatically reduced reimbursement

claims by the amount the districts are statutorily authorized to charge students for health fees, regardless of whether the districts chose to charge the fees or not. The court held that "[to] the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost. (*Clovis* at p. 812). The court reasoned that "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'" (*Ibid.*)

The same reasoning applies to Claimant here. They can choose not to put a fee to the voters, or the voters can reject a fee, but not at the state's expense. Similarly, applying the vote-exception for stormwater fees confirmed by SB 231, a majority of property owners can protest and defeat a stormwater fee, but not with the result of creating a state mandate. The application of Proposition 218 does not result in alleged mandate costs recoverable solely from tax proceeds. Sufficient fee authority exists, regardless of political feasibility.

Further, Claimant has authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via a process that may be required by Proposition 218. Local governments can choose not to submit a fee to the voters and voters can indeed reject a proposed fee, but not with the effect of turning permit costs into state reimbursable mandates. Under Government Code section 17556, subdivision (d), Claimant has authority to impose fees sufficient to pay for permit activities, and they are not eligible for mandate reimbursement. Because SB 231 clarifies Claimant's authority to increase property related sewer fees and charges to recover any costs associated with the Trash Order, the Commission should reject the Test Claim in its entirety.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erika Li".

ERIKA LI  
Program Budget Manager

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 30, 2019, I served the:

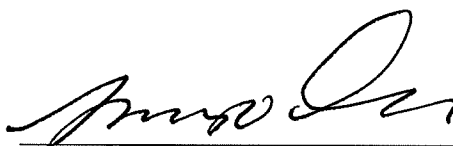
- **Finance's Late Comments on the Test Claim filed January 29, 2019**

*Water Code Section 13383(a) Phase I MS4 Trash Order Issued to County of Orange, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017, 17-TC-24*

County of Orange, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 30, 2019 at Sacramento, California.



Lorenzo Duran  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814  
(916) 323-3562

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 1/9/19

**Claim Number:** 17-TC-24

**Matter:** Water Code Section 13383(a) Phase I MS4 Trash Order Issued to County of Orange, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017

**Claimant:** County of Orange

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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**Socorro Aquino, State Controller's Office**

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-7522

SAquino@sco.ca.gov

**Harmeet Barkschat, Mandate Resource Services, LLC**

5325 Elkhorn Blvd. #307, Sacramento, CA 95842

Phone: (916) 727-1350

harmeet@calsdrc.com

**Ryan Baron, Best Best & Krieger LLP**

18101 Von Karman Avenue, Suite 1000, Irvine, CA 92612

Phone: (949) 263-6568

ryan.baron@bbklaw.com

**Lacey Baysinger, State Controller's Office**

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

lbaysinger@sco.ca.gov

**Allan Burdick,**

7525 Myrtle Vista Avenue, Sacramento, CA 95831

Phone: (916) 203-3608

allanburdick@gmail.com

**J. Bradley Burgess, MGT of America**

895 La Sierra Drive, Sacramento, CA 95864

Phone: (916) 595-2646

Bburgess@mgtamer.com

**Evelyn Calderon-Yee**, Bureau Chief, *State Controller's Office*

Local Government Programs and Services, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-5919

ECalderonYee@sco.ca.gov

**Gwendolyn Carlos**, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-0706

gcarlos@sco.ca.gov

**Annette Chinn**, *Cost Recovery Systems, Inc.*

705-2 East Bidwell Street, #294, Folsom, CA 95630

Phone: (916) 939-7901

achinnrcs@aol.com

**Carolyn Chu**, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8326

Carolyn.Chu@lao.ca.gov

**Anita Dagan**, Manager, Local Reimbursement Section, *State Controller's Office*

Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 324-4112

Adagan@sco.ca.gov

**Donna Ferebee**, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274

donna.ferebee@dof.ca.gov

**Adam Fischer**, *Santa Ana Regional Water Quality Control Board*

3737 Main Street, Suite 500, Riverside, CA 92501

Phone: (951) 320-6363

afischer@waterboards.ca.gov

**Susan Geanacou**, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274

susan.geanacou@dof.ca.gov

**Dillon Gibbons**, Legislative Representative, *California Special Districts Association*

1112 I Street Bridge, Suite 200, Sacramento, CA 95814

Phone: (916) 442-7887

dillong@csda.net

**Catherine George Hagan**, Senior Staff Counsel, *State Water Resources Control Board*

c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108

Phone: (619) 521-3012

catherine.hagan@waterboards.ca.gov

**Heather Halsey**, Executive Director, *Commission on State Mandates*

980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562

heather.halsey@csm.ca.gov

**Chris Hill**, Principal Program Budget Analyst, *Department of Finance*

Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Chris.Hill@dof.ca.gov

**Edward Jewik**, *County of Los Angeles*  
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012  
Phone: (213) 974-8564  
ejewik@auditor.lacounty.gov

**Anita Kerezsi**, *AK & Company*  
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446  
Phone: (805) 239-7994  
akcompanysb90@gmail.com

**Lisa Kurokawa**, Bureau Chief for Audits, *State Controller's Office*  
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 327-3138  
lkurokawa@sco.ca.gov

**Michael Lauffer**, Chief Counsel, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828  
Phone: (916) 341-5183  
michael.lauffer@waterboards.ca.gov

**Kim-Anh Le**, Deputy Controller, *County of San Mateo*  
555 County Center, 4th Floor, Redwood City, CA 94063  
Phone: (650) 599-1104  
kle@smcgov.org

**Erika Li**, Program Budget Manager, *Department of Finance*  
915 L Street, 10th Floor, Sacramento, CA 95814  
Phone: (916) 445-3274  
erika.li@dof.ca.gov

**Jill Magee**, Program Analyst, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
Jill.Magee@csm.ca.gov

**Michelle Mendoza**, *MAXIMUS*  
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403  
Phone: (949) 440-0845  
michellemendoza@maximus.com

**Meredith Miller**, Director of SB90 Services, *MAXIMUS*  
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670  
Phone: (972) 490-9990  
meredithcmiller@maximus.com

**Lourdes Morales**, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*  
925 L Street, Suite 1000, Sacramento, CA 95814  
Phone: (916) 319-8320  
Lourdes.Morales@LAO.CA.GOV

**Geoffrey Neill**, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*  
1100 K Street, Suite 101, Sacramento, CA 95814

Phone: (916) 327-7500  
gneill@counties.org

**Andy Nichols**, *Nichols Consulting*  
1857 44th Street, Sacramento, CA 95819  
Phone: (916) 455-3939  
andy@nichols-consulting.com

**Arthur Palkowitz**, *Artiano Shinoff*  
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106  
Phone: (619) 232-3122  
apalkowitz@as7law.com

**Jai Prasad**, *County of San Bernardino*  
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018  
Phone: (909) 386-8854  
jai.prasad@atc.sbcounty.gov

**Mark Rewolinski**, *MAXIMUS*  
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236  
Phone: (949) 440-0845  
markrewolinski@maximus.com

**David Rice**, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814  
Phone: (916) 341-5161  
davidrice@waterboards.ca.gov

**Brian Rutledge**, Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Brian.Rutledge@dof.ca.gov

**Teresita Sablan**, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814  
Phone: (916) 341-5174  
Teresita.Sablan@waterboards.ca.gov

**Theresa Schweitzer**, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3140  
tschweitzer@newportbeachca.gov

**Carla Shelton**, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
carla.shelton@csm.ca.gov

**Camille Shelton**, Chief Legal Counsel, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
camille.shelton@csm.ca.gov

**Natalie Sidarous**, *State Controller's Office*  
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 322-7453  
nSidarous@sco.ca.gov

**Hope Smythe**, Executive Officer, *Santa Ana Regional Water Quality Control Board*

3737 Main Street, Suite 500, Riverside, CA 92501-3348

Phone: (951) 782-4493

Hope.Smythe@waterboards.ca.gov

**Eileen Sobeck**, Executive Director, *State Water Resources Control Board*

1001 I Street, 22nd Floor, Sacramento, CA 95814-2828

Phone: (916) 341-5183

Eileen.Sobeck@waterboards.ca.gov

**Jim Spano**, Chief, Mandated Cost Audits Bureau, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-5849

jspano@sco.ca.gov

**Dennis Speciale**, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

DSpeciale@sco.ca.gov

**Joe Stephenshaw**, Director, *Senate Budget & Fiscal Review Committee*

California State Senate, State Capitol Room 5019, Sacramento, CA 95814

Phone: (916) 651-4103

Joe.Stephenshaw@sen.ca.gov

**Tracy Sullivan**, Legislative Analyst, *California State Association of Counties*

1100 K Street, Suite 101, Sacramento, CA 95814

Phone: (916) 327-7500

tsullivan@counties.org

**Tracy Sullivan**, Legislative Analyst, *California State Association of Counties (CSAC)*

Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814

Phone: (916) 650-8124

tsullivan@counties.org

**Derk Symons**, Staff Finance Budget Analyst, *Department of Finance*

Local Government Unit, 915 L Street, Sacramento, CA 95814

Phone: (916) 445-3274

Derk.Symons@dof.ca.gov

**Jolene Tollenaar**, *MGT of America*

2251 Harvard Street, Suite 134, Sacramento, CA 95815

Phone: (916) 243-8913

jolenetollenaar@gmail.com

**Evelyn Tseng**, *City of Newport Beach*

100 Civic Center Drive, Newport Beach, CA 92660

Phone: (949) 644-3127

etseng@newportbeachca.gov

**Brian Uhler**, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8328

Brian.Uhler@LAO.CA.GOV

**Emel Wadhwani**, Senior Staff Counsel, *State Water Resources Control Board*

Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814

Phone: (916) 322-3622

emel.wadhwani@waterboards.ca.gov



**Renee Wellhouse**, *David Wellhouse & Associates, Inc.*  
3609 Bradshaw Road, H-382, Sacramento, CA 95927  
Phone: (916) 797-4883  
dwa-renee@surewest.net

**Julia Woo**, Deputy County Counsel, *County of Orange*  
**Claimant Representative**  
333 West Santa Ana Blvd, Santa Ana, CA 92701  
Phone: (714) 834-6046  
julia.woo@coco.ocgov.com

**Eric Woolery**, Auditor-Controller, *County of Orange*  
12 Civic Center Plaza, Room #200, Santa Ana, CA 92702  
Phone: (714) 834-2450  
eric.woolery@ac.ocgov.com

**Hasmik Yaghobyan**, *County of Los Angeles*  
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012  
Phone: (213) 974-9653  
hyaghobyan@auditor.lacounty.gov